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situated persons

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

HELPING HAND CAREGIVERS LTD.,
an Illinois corporation, individually and
as the representative of a class of
similarly-situated persons,

Plaintiff,

v.

DARDEN CORPORATION, a Florida
corporation, MID WILSHIRE
CONSULTING, INC. d/b/a SOCIAL
WELLNESS, a California corporation,
BRIAN J. KANG, GREG M. JONES, and
JOHN DOES 1-12.

Defendants.

MC No.:

Action pending in the United States
District Court for the Northern District of
Illinois, Eastern Division, No. 1:14-cv-
10127, Hon. Manish S. Shah

**NOTICE OF MOTION, MOTION
TO COMPEL COMPLIANCE WITH
SUBPOENAS and MOTION TO
TRANSFER; MEMORANDUM OF
POINTS & AUTHORITIES IN
SUPPORT**

Judge:

Date:

Time:

Place:

1 NOTICE OF MOTION AND MOTION
 2 TO THE COURT, TO ALL PARTIES AND TO THEIR
 3 COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE THAT Plaintiff Helping Hand Caregivers,
 5 Ltd. ("Plaintiff") moves for an order requiring Defendant Greg M. Jones
 6 ("Jones") to comply with subpoenas issued on August 17 and 18, 2015,
 7 commanding him to produce documents and sit for a deposition. Pursuant to
 8 Fed. R. Civ. P. 45(f), Plaintiff also moves to transfer this Motion to Judge
 9 Manish S. Shah, who is presiding over the underlying action pending in the
 10 United States District Court for the Northern District of Illinois.

11 Despite having been properly served with the summons and complaint
 12 and the subpoenas, Jones has not appeared in the Illinois action and has
 13 ignored the subpoenas requesting documents and his deposition. This
 14 Motion is supported by the attached Memorandum of Points and
 15 Authorities, as well as the Declaration of Jonathan B. Piper.

16 Counsel for Plaintiff certifies that counsel attempted to contact Jones,
 17 including to meet and confer in good faith in attempt to resolve this
 18 disputed matter, before filing this motion. (See Declaration of Jonathan B.
 19 Piper in Support of Plaintiff's Motion to Compel, ("Piper Decl."), at ¶ 5.)
 20 Despite good faith efforts, Plaintiff's counsel was unable to obtain any
 21 response from Jones. (*Id.* at ¶ 6.)

22 Dated: January 27, 2016

Respectfully submitted,
 DIAZ LAW
 BOCK & HATCH, LLC

25 /s/ Denise L. Díaz

26 Denise L. Díaz
 27 Attorneys for Plaintiff
 28 HELPING HAND CAREGIVERS,
 LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Introduction.

This motion seeks to enforce two subpoenas issued to Greg M. Jones (“Jones”) commanding him to produce documents and give deposition testimony. The underlying litigation is pending in the United States District Court for the Northern District of Illinois, Case No. 1:14-cv-10127 (the “Illinois Action”), between Helping Hand Caregivers, Ltd. and Darden Corporation, Mid Wilshire Consulting, Inc. d/b/a Social Wellness, Brian J. Kang and Greg M. Jones. This motion is brought in this court pursuant to Fed. R. Civ. P. 45, which requires that motions to compel compliance with a subpoena or to hold a non-compliant person in contempt be brought in the court for the district where compliance is required. Although the underlying case is pending in the Northern District of Illinois, Jones resides and was commanded to appear for a deposition in the Central District of California.

B. The Illinois Action.

Plaintiff Helping Hand Caregivers, Ltd. (“Plaintiff”), filed suit against Darden Corporation (“Darden”), Brian J. Kang (“Kang”) and Mid Wilshire Consulting, Inc. d/b/a Social Wellness (“Social Wellness”), alleging that they violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”) and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2, *et seq.* (“ICFA”) by sending fax advertisements without first obtaining the recipients’ prior express invitation or permission and without including the proper opt out notice required by the TCPA. Plaintiff brought the Illinois Action on behalf of itself and a putative class of similarly-situated persons. (Illinois Action, ECF No. 1.)

Darden moved to dismiss the claims against it, arguing that it was not responsible for the fax at issue and that Plaintiff’s claims were properly

1 brought against Kang and Social Wellness. (*Id.*, ECF No. 22.) Judge Manish
 2 S. Shah denied Darden's motion to dismiss the TCPA claim, but dismissed
 3 Plaintiff's ICFA count. (*Id.*, ECF No. 30.)

4 Plaintiff and Darden engaged in preliminary written discovery.
 5 Darden produced documents and answers to interrogatories indicating that
 6 it was in negotiations with Jones, an account manager at Social Wellness,
 7 about a joint venture whereby Olive Garden—a national restaurant brand
 8 owned by Darden—would provide food and marketing assistance for Social
 9 Wellness' Lunch n' Learn seminars. The discovery also indicated that
 10 Darden and Jones communicated about the faxes. In light of that discovery,
 11 Plaintiff filed an amended complaint, adding Jones as a party defendant,
 12 and making clear that while "Social Wellness, Kang and Jones physically
 13 transmitted the faxes, or caused them to be transmitted[, t]he faxes were
 14 sent by or on behalf of all Defendants and the faxes advertised the
 15 commercial availability of all Defendants' goods, products or services." (*Id.*,
 16 ECF No. 36, ¶ 21.) Jones was served with Plaintiff's Amended Class Action
 17 Complaint on August 20, 2015 but has not appeared in the Illinois action.
 18 (*Id.*, ECF No. 51, attached as Piper Decl., Ex. 1.)

19 The two subpoenas Plaintiff seeks to enforce against Jones were
 20 issued in the Illinois Action on August 17 and 18, 2015 and served on Jones
 21 August 20, 2015. (Piper Decl., ¶¶ 4-5, Exs. 2 and 3.)

22 **C. Federal Rule 45 is Satisfied.**

23 The Court should enforce the two subpoenas served on Jones. The
 24 general form and content of the subpoenas comply with Federal Rule 45(a).
 25 (*See* Piper Decl., Ex. 2.) Plaintiff provided notice of the two subpoenas by
 26 email and U.S. mail to Darden on August 17 and 18, 2015, pursuant to Fed.
 27 R. Civ. P. 45(a)(4). (Piper Decl., ¶ 6.) Jones was personally served with both
 28 subpoenas on August 20, 2015. (*Id.*, ¶ 5, Ex. 3.) Jones thus had ample time

1 to comply with them. No party objected to the subpoenas. There is no reason
2 to delay enforcement of the subpoenas.

3 **D. Jones' Evasions.**

4 Social Wellness, Kang and Jones have not appeared in the Illinois
5 case, despite never contesting service of process. On August 17 and 18,
6 2015, Plaintiff issued subpoenas pursuant to Fed. R. Civ. P. 45,
7 commanding Jones to appear for a deposition in Hemet, CA on September
8 17, 2015, and produce documents in accordance with an attached rider.
9 (Piper Decl., ¶ 3, Ex. 1.) Jones was personally served with the subpoenas by
10 a process server on August 20, 2015. (*Id.*, ¶ 4, Ex. 2.) Since being served
11 with the subpoenas, Jones has not given his deposition, produced any
12 documents, or otherwise responded to Plaintiff's attempts to obtain
13 information from him. (*Id.*, ¶ 6.) Indeed, he has not responded at all to the
14 subpoenas. All attempts to reach him have failed. (*Id.*, ¶¶ 7-8.)

15 **II. LEGAL ARGUMENT**

16 **A. The Court should compel Jones to comply with the** 17 **subpoenas and hold him in contempt if he continues to** 18 **ignore Plaintiff's subpoenas.**

19 Fed. R. Civ. P. 45 permits Plaintiff to serve a subpoena duces tecum on
20 a party. *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1410
21 (S.D. Cal. 1994) ("A subpoena *duces tecum* may be served on a party to the
22 lawsuit or a third person.") If the subpoenaed party raises an objection to
23 the subpoena, the serving party may move for an order compelling
24 production. Fed. R. Civ. P. 45(d)(2)(B)(i). However, if the subpoenaed party
25 completely ignores the subpoena, the court may hold them in contempt for
26 failure to obey the subpoena without an adequate excuse. Fed. R. Civ. P.
27 45(g).

1 **1. The properly-issued subpoena has the same force as a**
 2 **court order.**

3 “Proper subpoenas issued by attorneys on behalf of the court are
 4 treated as orders of the Court.” *Morguita-Johnson v. City of Fresno*, 2015
 5 WL 1021123, at *2 (E.D. Cal. Mar. 9, 2015), *citing SEC v. Hyatt*, 621 F.3d
 6 687, 693 (7th Cir. 2010); *Bademyan v. Receivable Mgmt. Servs. Corp.*, 2009
 7 WL 605789, at *1 (C.D. Cal. Mar. 9, 2009) (“Even though subpoenas are
 8 issued by attorneys, they are issued on behalf of the Court and should be
 9 treated as orders of the Court.”); Fed. R. Civ. P. 45, Advisory Committee
 10 notes for 1991 Amendment (“Although the subpoena is in a sense the
 11 command of the attorney who completes the form, defiance of a subpoena is
 12 nevertheless an act in defiance of a court order and exposes the defiant
 13 witness to contempt sanctions.”) Fed. R. Civ. P. 45 requires that a subpoena
 14 be issued from the court where the action is pending and that it be served
 15 by delivering a copy to the named person.

16 The subpoenas here were properly issued and served on Jones. Each
 17 subpoena was issued from the Northern District of Illinois, the court where
 18 the underlying action is pending, in accordance with Fed. R. Civ. P. 45(a)(2).
 19 (Piper Decl., Ex. 1.) Jones was personally served by a process server on
 20 August 20, 2015 with subpoenas for documents and for his deposition in
 21 accordance with Fed. R. Civ. P. 45(b). (Piper Decl., Ex. 2.)

22 Further, both subpoenas complied with the 100 mile limit contained in
 23 Fed. R. Civ. P. 45 because they do not require Jones to travel more than 100
 24 miles to comply. “[T]he 100 mile limit . . . applies to travel by a subpoenaed
 25 person, but a person commanded to produce documents need not appear in
 26 person at the place of production or inspection.” *Wahoo Int’l, Inc. v. Phix*
 27 *Doctor, Inc.*, 2014 WL 3573400, at *4 (S.D. Cal. Jul. 18, 2014), *quoting*
 28 *Walker v. Ctr. for Food Safety*, 667 F. Supp. 2d 133, 138 (D.D.C. 2009)

1 (enforcing a subpoena and rejecting the argument that it was invalid
2 because it required production of documents at a location more than 100
3 miles away). Rule 45 explicitly states that “[a] person commanded to
4 produce documents, electronically stored information, or tangible things . . .
5 need not appear in person at the place of production. Fed. R. Civ. P.
6 45(d)(2)(A). Indeed, the majority of courts that have addressed the issue of a
7 subpoena that requires production of documents more than 100 miles away
8 have held that the subpoena should be enforced. *U.S. Bank Nat’l Ass’n v.*
9 *James*, 264 F.R.D. 17, 19-20 (D. Me. 2010) (collecting cases).

10 The subpoena requiring Jones to appear for his deposition complies
11 with the 100 mile limit because it only required him to travel six miles to sit
12 for his deposition. (Piper Decl., Ex. 2.) The subpoena requiring Jones to
13 produce documents to Bock & Hatch, LLC in Chicago also complied with
14 100 mile limit because Jones was not required to appear there in person to
15 produce documents. Fed. R. Civ. P. 45(d)(2)(A). Because Jones was not
16 required to appear in Chicago to produce the requested documents, the
17 subpoena did not require him to travel more than 100 miles. In any event,
18 Jones could have provided the requested documents at his deposition, which
19 was only six miles away.

20 The subpoenas to Jones were properly issued, properly served, and
21 otherwise complied with all of the requirements of Fed. R. Civ. P. 45.
22 Therefore, they should be given the same effect as a court order.

23 **2. Jones should be ordered to show cause for failing to**
24 **obey the subpoenas and held in contempt if he**
25 **continues to ignore them.**

26 The purpose of civil contempt is to “compel obedience to a court order.”
27 *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir.
28 1983). Contempt is characterized as “civil in nature when the sanction

1 imposed is wholly remedial, serves only the purposes of the complainant,
2 and is not intended as a deterrent to offenses against the public.” *Id.*

3 “Courts have inherent power to enforce their orders through civil
4 contempt.” *Bademyan*, 2009 WL 605789, at *1. The Ninth “Circuit’s rule
5 with regard to contempt has long been whether the defendants have
6 performed ‘all reasonable steps within their power to ensure compliance.’”
7 *Stone v. City and Cnty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992),
8 quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 404 (9th Cir. 1976).
9 “The party moving for contempt bears the burden of establishing by clear
10 and convincing evidence that the contemnor has violated a specific and
11 definite order of the court.” *Bademyan*, 2009 WL 605789, at *2 (*citing*
12 *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997)
13 (among others)). “In assessing whether an alleged contemnor has taken
14 ‘every reasonable step’ to comply with the terms of a court order, the district
15 court can consider (1) a history of noncompliance and (2) a failure to comply
16 despite the pendency of a contempt motion.” *Bademyan*, 2009 WL 605789,
17 at *2 (*citing Stone*, 968 F.2d at 857). “The contempt need not be willful . . .
18 and a party’s subjective intent is irrelevant.” *Id.* at *2.

19 Here, Plaintiff seeks to compel Jones to obey the subpoenas, and
20 requests that the court order Jones to show cause and hold him in civil
21 contempt if he fails to do so. Jones has not performed all reasonable steps
22 within his power to comply with the subpoenas. In fact, after being served
23 over four months ago, Jones has completely ignored the subpoenas. (Piper
24 Decl., ¶¶ 4 and 6, Ex. 2.) The properly issued and served subpoenas imposed
25 clear and definite requirements for Jones to appear for a deposition and to
26 produce documents to Plaintiff. The subpoena for Jones’ deposition specified
27 the date, time, and place for Jones to appear. (*Id.*, Ex. 1.) The subpoena for
28

1 documents contained a very specific list of the documents that Plaintiff was
2 requesting Jones to produce. (*Id.*)

3 Rather than object to or comply with the subpoenas, Jones has simply
4 ignored them. (*Id.*, ¶ 6.) Because the subpoenas are tantamount to a court
5 order, the court should use its inherent powers and order Jones to show
6 cause why he has not complied with them. If Jones still fails to respond, the
7 Court should hold him in contempt.

8 **3. The Court should order Jones to comply with the**
9 **subpoenas or face sanctions.**

10 Sanctions for civil contempt can coerce compliance or compensate the
11 party seeking compliance “for injuries resulting from the contemptuous
12 behavior, or both.” *Bademyan*, 2009 WL 605789, at *3. Attorneys’ fees and
13 costs can be imposed against a party held in contempt. *Id.* at *4. “A civil
14 contempt order must include a ‘purge’ condition which provides the
15 contemnor with an opportunity to comply with the order before payment of
16 the fine or other sanction becomes due.” *Moore v. Chase, Inc.*, 2015 WL
17 5732805, at *3 (E.D. Cal. Sept. 29, 2015).

18 Here, Jones has completely ignored Plaintiff’s subpoenas. (Piper Decl.,
19 ¶ 6.) The Court should order Jones to show cause why he has not complied
20 with the subpoenas. If Jones still fails to comply, the Court should require
21 him to pay Plaintiff’s attorneys’ fees and costs involved in obtaining his
22 compliance and impose any other sanctions it deems proper under the
23 circumstances. Plaintiff has incurred significant expenses in bringing this
24 motion and attempting to obtain Jones’s compliance with the properly
25 issued and served subpoenas. Therefore, the Court should impose sanctions
26 on Jones if he chooses to continue to ignore the subpoenas.
27
28

1 **B. The Court should transfer this matter to the Northern**
2 **District of Illinois for the Judge presiding over this case**
3 **generally to enforce.**

4 Rule 45 requires that the subpoena be “issue[d] from the court where
5 the action is pending.” Fed. R. Civ. P. 45(a)(2). However, “[t]he court for the
6 district where compliance is required—and also, after a motion is
7 transferred, the issuing court”—can hold in contempt a non-compliant
8 party. Fed. R. Civ. P. 45(g). “When the court where compliance is required
9 did not issue the subpoena, it may transfer a motion under this rule to the
10 issuing court if the person subject to the subpoena consents or if the court
11 finds exceptional circumstances.” Fed. R. Civ. P. 45(f). Further, “[t]o enforce
12 its order, the issuing court may transfer the order to the court where the
13 motion was made.” *Id.*

14 “In the absence of consent, the court may transfer in exceptional
15 circumstances.” Fed. R. Civ. P. 45(f), Advisory Committee notes to 2013
16 Amendment. “The prime concern should be avoiding burdens on local
17 nonparties.” *Id.* “[E]xceptional circumstances include situations in which
18 transfer is ‘warranted in order to avoid disrupting the issuing court’s
19 management of the underlying litigation, as when that court has already
20 ruled on issues presented by the motion.’” *Moon Mountain Farms, LLC v.*
21 *Rural Community Ins. Co.*, 301 F.R.D. 426, 429 (N.D. Cal. 2014), *quoting*
22 Fed. R. Civ. P. 45(f), Advisory Committee notes to 2013 Amendment. Courts
23 that have addressed motions to transfer under Rule 45(f) have found
24 exceptional circumstances in a variety of contexts, including (1) where there
25 was already a production order in the issuing court; (2) where ruling on the
26 motion risked an inconsistent ruling that would disrupt the underlying
27 litigation; (3) where the issuing court already ruled on issues in the motion;
28

1 and (4) where the judge in the underlying litigation was more familiar with
2 the issues involved. *See id.* (collecting cases).

3 Here, the concerns about burdening a local nonparty subject to a
4 subpoena are not present because Jones is a party to the Illinois Action.
5 (Illinois Action, ECF No. 36.) Further, exceptional circumstances exist
6 because Plaintiff is also seeking to subpoena two other parties in this case
7 who are connected to Jones—Social Wellness and Kang. If this matter is
8 transferred back to the Northern District of Illinois, the judge there, who is
9 familiar with the issues involved in this case, could ensure that consistent
10 rulings are made across this and any subsequent issues in compelling
11 subpoenaed information from parties to the litigation.

12 Moreover, Judge Shah of the Northern District of Illinois is familiar
13 with the issues involved in this action. After Plaintiff filed its Complaint
14 against Darden and the Social Wellness Defendants, Darden sought a
15 preliminary injunction against Social Wellness, requesting that the court
16 enjoin Social Wellness from using Darden's Olive Garden trademarks or
17 other marks. *Darden Concepts, Inc. v. Mid Wilshire Consulting, Inc., d/b/a*
18 *Social Wellness, et al.*, No. 15 CV 5716 (N.D. Ill.). Judge Shah presided over
19 the injunction proceedings and entered a preliminary injunction order
20 against Social Wellness. (*Id.*, ECF No. 15.) Darden then filed a Fed.R.Civ.P.
21 11 motion for sanctions against Plaintiff, arguing that Plaintiff was
22 knowingly maintaining frivolous claims against Darden, as Darden
23 informed Plaintiff that Jones, Kang and Social Wellness were responsible
24 for the faxes at issue. (Illinois Action, ECF No. 39.) Darden cited the
25 existence of the preliminary injunction order in its motion for sanctions.
26 (*Id.*) Plaintiff successfully defeated Darden's motion for sanctions, arguing,
27 in part, that Darden's reliance on the preliminary injunction was improper
28 in part because Darden had failed to disclose its negotiations with Social

1 Wellness when it sought the order. Plaintiff also argued that its Complaint
2 was well-grounded in law based on the evolving definition of “sender”
3 liability under the TCPA. After reviewing the parties’ lengthy submissions,
4 Judge Shah denied Darden’s request for sanctions. (Illinois Action, ECF No.
5 56.) Judge Shah understands the roles of the parties in the action, the
6 theories of liability and the underlying facts, and is well-suited to enforce
7 the subpoenas against Jones so as not to disrupt the litigation in Illinois.

8 Pursuant to Fed. R. Civ. P. 45(f) and (g), the court in the Northern
9 District of Illinois can hold Jones in contempt and also can enforce any
10 contempt order issued by this Court. Therefore, under these circumstances,
11 transferring this matter back to the Northern District of Illinois is
12 appropriate.

13 VI. CONCLUSION

14 For the foregoing reasons, the Court should order Defendant Jones to
15 comply with Plaintiff’s subpoenas and hold him in contempt of Court if he
16 continues to ignore them. Further, the Court should transfer this motion to
17 the issuing court, the Northern District of Illinois.

18
19 Dated: January 27, 2016

Respectfully submitted,
DIAZ LAW
BOCK & HATCH, LLC

20
21
22
23 /s/ Denise L. Díaz

24 Denise L. Díaz

25
26 Attorneys for Plaintiff
27 HELPING HAND CAREGIVERS,
28 LTD.